

¹ Form K-WC E-1 (Rev. 5-02), Amended Application for Hearing (filed June 2, 2008).

condition is diagnosed as work-related, provided such fact is communicated in writing to the injured worker.²

The Judge did not specify the date of accident she actually found.

Respondent contends Judge Sanders erred by finding (1) the work claimant performed for respondent caused his injuries, (2) claimant's injuries were caused by repetitive trauma as opposed to a single traumatic event, and (3) claimant gave respondent timely notice of his accidental injury. Respondent argues claimant's injuries could have just as easily arisen from activities other than work, such as repair work on his rental properties. In addition, respondent argues claimant is unable to prove his job tasks were performed with such repetition sufficient to cause his injuries. Moreover, respondent argues claimant is not credible and that he failed to establish "just cause" to extend the time period for providing respondent with notice of his accidental injury. Accordingly, respondent requests the Board to reverse the preliminary hearing Order.

Conversely, claimant contends the preliminary hearing Order should be affirmed. Claimant argues he injured his back from lifting 50-pound bags of wood chips some 50 times per shift and constantly bending over while cleaning a large oven. He also argues the appropriate date of accident is March 18, 2008, when he gave respondent written notice that he had injured his low back and left leg at work.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent?
2. If so, did claimant provide respondent with timely notice of the accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned finds and concludes the preliminary hearing Order should be affirmed.

Claimant works for respondent as an oven technician. That job requires claimant to lift 50-pound bags of wood chips and clean a large oven. Claimant estimates he lifts approximately 50 bags of wood chips each day. Cleaning the oven is another matter, however, as it requires claimant to crawl through doors in the oven and clean up meat that has fallen from a four-foot-high conveyor belt. While bending over under the conveyor belt,

² ALJ Order (July 24, 2008) at 1.

claimant scoops meat into buckets or totes, which are then pulled and lifted from the oven. Claimant estimates the totes weigh approximately 50 pounds when full. Moreover, he estimates it takes approximately 1½ to 2 hours to clean the oven, during which he is bending over.

Claimant testified that around the end of December 2007 he began experiencing numbness in his left leg. He reported the symptom to the company nurse, who told claimant she did not know what it was. But as he continued to work his symptoms progressed from numbness to pain and eventually worsened to the point he had problems bending over. He again reported his symptoms to the company nurses, who told him to take Advil.

Eventually claimant decided to consult his family doctor. Claimant thought he first saw Dr. Richard E. Lochamy in early March 2008. But medical records that were introduced at the preliminary hearing indicate claimant saw a Dr. Hodges on December 13, 2007, at which time claimant reported his symptoms had started one or two months before.

On March 18, 2008, claimant completed an Employer's Report of Accident. Respondent declined to provide claimant treatment. Instead, respondent suspended claimant for a couple of days for failing to report his work injury in a timely manner. Claimant initially reported January 26, 2008, as his date of accident but he explained that date was used as the company nurse asked him to provide an approximate date that his injury occurred.

When claimant testified at the preliminary hearing, he was still working for respondent and still performing his job as an oven technician.

The medical records introduced at the preliminary hearing indicate claimant was evaluated by Dr. Joseph W. Huston, an orthopedic surgeon, at claimant's attorney's request in early June 2008. The doctor's June 2008 report indicates claimant underwent a lumbar CT scan on March 8, 2008, which revealed a left-sided L4-5 disc bulge that compresses the L4 nerve root and also lesser bulges at L3-4 and L5-S1. Dr. Huston concluded that claimant had lumbar degenerative disc disease, L4-5 disc protrusion with left lower extremity radiculopathy. The doctor recommended a lumbar MRI, a left lower extremity EMG and nerve conduction study, and, perhaps, a lumbar epidural steroid injection. By an addendum dated July 22, 2008, the doctor indicated that claimant's low back and left leg symptoms resulted from the work he performed for respondent.

Dr. Huston's report also indicates claimant was initially evaluated for deep vein thrombosis in November 2007 after complaining of symptoms in his left leg. The report also indicates claimant saw Dr. Peter Hodges, an orthopedic surgeon in Manhattan, Kansas, in December 2007, who diagnosed left leg sciatica and degenerative disc disease in the lumbar spine and prescribed physical therapy.

In addition to medical records, respondent introduced a videotape showing claimant on a roof at one of his rental houses in July 2008, which was months after claimant had reported his injury to respondent and had sought medical treatment. Consequently, that videotape has little, if any, value in determining the cause of claimant's symptoms in late 2007 and early 2008.

Considering the evidence presented to date, the undersigned finds that the greater weight of the evidence establishes it is more probably true than not that claimant injured his low back working for respondent performing the duties of an oven technician. The undersigned also finds it is more probably true than not that claimant's accidental injury occurred over a period of time due to repetitive traumas and, therefore, the Judge's implied finding that the appropriate date of accident for this repetitive trauma injury was March 18, 2008, is affirmed. Likewise, the Judge's finding that claimant provided respondent with timely notice of the accidental injury is also affirmed as the written notice claimant provided respondent triggered the accident date under K.S.A. 2007 Supp. 44-508(d).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the July 24, 2008, Order entered by Judge Sanders.

IT IS SO ORDERED.

Dated this ____ day of September, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge

³ K.S.A. 44-534a.